TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statutes and Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. Petitioner Was Deprived of His Right to a Speedy Trial	6
A. The Length of Delay	6
B. The Reason for Delay	7
C. Assertion of Defendant's Right	8
D. Prejudice Caused by Delay	9
E. The Court of Appeals' Analysis Conflicts with This Court's Decision in *Barker* v. *Wingo*, — U.S. — (1972)	10
II. Petitioner Was Irreparably Prejudiced by Testimony Concerning a Co-Conspirator's Conviction of Perjury	13
Conclusion	19

TABLE OF AUTHORITIES

Cases Cited:

Barker v. *Wingo*, — U.S. —, 40 U.S.L.W. 4840 (June 22, 1972) ..... *passim*
United States v. *Atkinson*, 297 U.S. 157 (1936) 17

Constitutional Provisions Cited:

U. S. Constitution, Fifth Amendment 2
U. S. Constitution, Sixth Amendment 2, 6

Page

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 48(b) 6

Rule 52(b) 2, 17

SECOND CIRCUIT RULES:

Second Circuit Rules for Prompt Disposition of Criminal Cases (1971) (Appendix D) 2

STATUTES CITED:

18 U.S.C. § 2 2

18 U.S.C. § 371 2

26 U.S.C. § 7206(2) 2

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

DAVID HANDEL, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The unreported opinion of the Court of Appeals is reproduced as Appendix A to this petition. The District Court did not issue an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1972 (Appendix B). A timely motion for

rehearing and rehearing *en banc* was denied in orders entered July 28, 1972 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the government's unexplained, five-year delay from arrest to prosecution violated petitioner's Sixth Amendment right to a speedy trial in view of the prejudice suffered by petitioner because of the death of a witness crucial to his defense.

2. An alleged co-conspirator, testifying as a government witness and being questioned by government counsel, was allowed to testify that he had previously been convicted of perjury for denying the conspiracy here in issue. Is this testimony so prejudicial as to have denied petitioner a fair trial in violation of his right of due process.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."

This case also involves the Due Process Clause of the Fifth Amendment which provides that no person shall "be deprived of life, liberty or property without due process of law . . ."

STATUTES AND RULES INVOLVED

This case involves 18 U.S.C. §§ 2, 371, 26 U.S.C. § 7206(2), Rule 52(b) of the Federal Rules of Criminal Procedure, and the Second Circuit's Rules for Prompt Disposition of Criminal Cases (1971) (Appendix D).

STATEMENT OF THE CASE

Petitioner, David Handel, was tried by jury and found guilty on one count of having conspired to defraud the United States in the ascertainment and collection of revenue information. He was acquitted by the jury on the substantive count of having caused the preparation of a false Information Return, Form 1099.

The charges against petitioner arose from his alleged participation in a twin-double pari-mutuel betting scheme operated by New York's Yonkers and Roosevelt Raceways during the mid-1960's. Some time in 1965, apparently, the government began an investigation of the practice whereby some twin-double winners employed other individuals to cash winning tickets in order to have the winnings reported to the Internal Revenue Service on Form 1099 as the income of the cashers rather than of the real winners. Petitioner at that time earned his living as a successful owner and breeder of horses. This occupation necessitated his daily presence at the raceways, and he was a regular purchaser of twin-double and other pari-mutuel tickets.

In 1965, petitioner was questioned about the twin-double cashing scheme by the United States Attorney's Office in the Eastern District of New York. Although he denied any personal involvement in the cashing scheme, he cooperated in the government's investigation. The government took no further action in connection with petitioner until suddenly, on the evening of May 23, 1966, he was arrested at Yonkers Raceway. The arrest was pursuant to a warrant issued on a complaint by a special agent of the IRS. The agent's complaint stated that he had received information from a

reliable witness that petitioner had paid the witness to cash a ticket for him and to cause Yonkers Raceway to issue a false Form 1099. Despite this claim of probable cause sufficient to warrant the arrest of petitioner, the government did not present the case to a grand jury. Instead, six weeks later, at petitioner's request the government moved to dismiss the complaint.

Then, on December 5, 1968, almost two and one-half years after the arrest, an indictment was returned against petitioner and one Robert Elvin, an alleged co-conspirator. Following the return of the indictment, little happened. On June 2, 1969, defendant moved for a bill of particulars and the motion was granted in part. But the government supplied no particulars.

Then, on February 7, 1971—over two years after issuance of the indictment—the government served notice that it would be ready to proceed to trial sometime after April 1, 1971, upon 20-days notice. Thus, seven years after the events in issue, six years after petitioner had been interrogated, five years after he was arrested (on a warrant based on alleged probable cause), and nearly three years after he was indicted, the government finally announced that it was ready for trial.

Petitioner in no way contributed to this extraordinary delay. He did not request a continuance, nor did he engage in delatory manuvering to achieve that result. On September 21, 1971, petitioner moved to dismiss the indictment by reason of the government's failure to afford him a speedy trial. The government offered no excuse whatsoever for its delay. Nonetheless, the trial court denied the motion saying:

> "... What is virtually insuperable in your case is that the defendant didn't come in himself scream-

ing [for a speedy trial]." Hearing on Motion to Dismiss, October 1, 1971, (Tr. p. 10).

Petitioner's trial began on October 18, 1971. He was tried alone. The alleged co-conspirator, Robert Elvin, had pleaded guilty and was awaiting sentencing at the time of petitioner's trial at which he testified for the government. The government's case was based entirely upon the testimony of five alleged co-conspirators who testified they had cashed tickets for petitioner or had arranged for tickets to be cashed. Each of the alleged co-conspirators had a criminal record or was under indictment at the time of his testimony, and each was seeking special treatment from the government in return for his favorable testimony.

During the course of the government's delay in bringing petitioner to trial, the only witness who could provide testimony to contradict the government's case died. Because of petitioner's occupation as an owner and breeder of race horses, it was his practice to spend practically every evening at the track, most often in the box of a friend and fellow horse-owner, Saul Finkelstein. It was Mr. Finkelstein's testimony which petitioner hoped to introduce as corroboration of his own that he did not employ any of the government's witnesses as cashers. The government's witnesses had testified to having cashed innumerable tickets for petitioner. Mr. Finkelstein would surely have to have seen these individuals with petitioner if their stories were true. But Mr. Finkelstein died before the case finally came to trial.

REASONS FOR GRANTING THE WRIT

I

Petitioner Was Deprived of His Right to a Speedy Trial

Both the Sixth Amendment and Rule 48(b), F. R. Crim. P., guarantee an accused the right to a speedy trial. We believe petitioner was denied that right and that the Court of Appeals' decision rejecting that claim conflicts with this Court's pronouncements in *Barker* v. *Wingo*, — U.S. —, 40 U.S.L.W. 4840 (June 22, 1972), a decision issued subsequent to the Court of Appeals' opinion in the instant case.

In *Barker*, this Court enumerated four factors which must be weighed on an ad hoc basis in determining whether an accused has been denied a speedy trial: (1) the length of the delay, (2) the reason the government assigns to justify the delay, (3) whether defendant asserted his right, and (4) whether defendant suffered prejudice by reason of the delay.

Weighing these factors, petitioner's case presents a classic example of deprivation of the speedy trial guarantee.

A. The Length of Delay

Petitioner, through no fault of his own, experienced delay at each turn of events. No matter what period one focuses upon—three years post-indictment or five years post-arrest—the delay was unreasonably long. Indeed, there was a lapse of approximately seven years from the time of the alleged overt acts.

As this Court pointed out in *Barker*, the reasonableness of a period of delay is necessarily dependent upon the peculiar circumstances of each case. This case was not a complex conspiracy charge. Petitioner was indicted for causing winning twin-double tickets to be

cashed by persons other than the true winner so that the revenue information would be reported to the Internal Revenue Service as income to the cashers rather than the actual winners.

As early as May 1966, the government claimed to have knowledge sufficient to arrest petitioner for having paid a witness to cash a ticket for him and to cause Yonkers to issue a false Form 1099. Even with this evidence supposedly in hand, the government delayed over five and one-half years before bringing petitioner to trial. As this Court stated in *Barker*, at 4846:

> "It is clear that the length of delay between arrest and trial—well over five years—was *extraordinary*" (emphasis added).

B. The Reason for Delay

At petitioner's hearing on his motion to dismiss for lack of a speedy trial, the government offered absolutely no justification for its inordinant delay in bringing petitioner to trial. In its brief to the Court of Appeals, the government for the first time asserted that the two and one-half year delay between arrest and indictment was consumed by "extensive investigation, review of the case and presentation to a grand jury." Govt. Appl. Br., at 8. The government noted that in a "so-called twin-double case, . . . regular racetrack clientele must be located and interviewed regarding their recollection of specific races in months or years passed." *Id.*

We fail to understand why this investigation should have consumed over two and one-half years, particularly in light of the government's assertion in the arrest complaint of May 1966, that a "reliable wit-

ness' had informed the government that petitioner was engaged in the illegal ticket-cashing scheme.

As for the two-year delay between indictment and trial, the government asserted below that this period was "clearly reasonable." Govt. Appl. Br., at 8. In fact, the government seemed to imply that the two-year delay was excusable because petitioner did not move for a bill of particulars until six months after he had pleaded not guilty. How petitioner's request for a bill six months after his plea, can justify the government's two-year post-indictment delay is incomprehensible.

In light of the government's failure to offer any justification for the delay to the trial court, and its reliance before the Court of Appeals upon generalities of investigatory necessity, it seems likely that the delay was occasioned by the government's intentional desire to wait until it had successfully indicted five individuals who, in return for favorable treatment, would testify that they had cashed tickets for petitioner. Whatever the government's reason, it simply does not excuse the five and one-half year delay from the date of petitioner's arrest to his trial.

C. Assertion of Defendant's Right

This Court in *Barker* flatly rejected the notion that a defendant waives his right to a speedy trial by failure to assert it. Instead, failure to assert the right is only one factor among four which must be weighed in determining whether an accused has been denied this constitutional guarantee. If, for example, a defendant has for tactical reasons refused to assert the right, he will not later be heard to claim that the right has been denied.

But this is not an instance in which petitioner has refrained from asserting his right for tactical reasons. The defense tactics in this case belie a claim of waiver —intentional or otherwise. Petitioner engaged in no dilatory action or pretrial maneuvering. His only motion, other than the request to dismiss for lack of a speedy trial, was for a bill of particulars which was issued by the government more than two years after requested and only weeks before trial.

Petitioner did not create an atmosphere fostering delay; nor did he deliberately acquiesce in the government's failure to prosecute his case. Petitioner was without counsel for quite some time when his original attorney withdrew from the case because petitioner could not pay his fee. Replacement counsel, shortly after entering the case, moved to dismiss the indictment on grounds of denial of a speedy trial. This motion was made on September 21, 1971, nearly a month prior to the date of trial. It may be true that petitioner was not "screaming" for a speedy trial from the outset, but it is true also that he did nothing to waive his right either.

D. Prejudice Caused by Delay

Prejudice to a defendant arises both from anxiety and concern over the impending prosecution and from the possibility that delay will impair his defense. Petitioner suffered both. Subsequent to his arrest, the New York State Harness Commission suspended his right to run horses, thereby causing him severe economic hardship. It was only after petitioner's counsel requested the government to dismiss the outstanding complaint that the government did so, pending presentation of the case to the grand jury—which did

not occur for more than two and one-half years thereafter.

But the prejudice petitioner suffered was not limited to the anxiety of social and financial hardship. He was severely handicapped in the presentation of his defense. Not only did he suffer the normal difficulty of attempting to counter the prosecutor's case through recollection of daily events occurring over seven years previously; in this instance, the delay tolled the life of a witness crucial to petitioner's defense.

The death in this case was not that of "just any witness." As a daily patron of the races, petitioner was the constant guest in a box seat owned by Mr. Saul Finkelstein, a prominent owner of horses. Mr. Finkelstein, a close friend and associate of petitioner, knew petitioner's betting practices. He advised and counselled, and was intimately aware of petitioner's actions at the track. Only he could provide crucial testimony to contradict the dimly recollected claims of five government witnesses, each seeking something in return for his participation. The death of this important material witness caused immeasurable prejudice to petitioner's defense.

E. The Court of Appeals' Analysis Conflicts with this Court's Decision in Barker v. Wingo, U.S. (1972).

Applying the teachings of this Court in *Barker,* petitioner's conviction should be reversed because of the denial of his right to a speedy trial. But the Court of Appeals did not view the facts of this case in a manner consistent with this Court's subsequent opinion.

First, the Court of Appeals dismissed out-of-hand the two and one-half year delay between the arrest and indictment. The court determined that the speedy trial

provision of the Sixth Amendment did not apply to that period because there had not been an "arrest and holding" (App. 3a). We do not believe an extended delay of two and one-half years between arrest and indictment can be "ignored" simply because the accused was not incarcerated.

Second, with respect to the two and one-half year delay following the indictment, the court pointed out that petitioner had failed to demand a trial and that "absent compelling countervailing considerations," such a failure would be viewed as a waiver of the right to a speedy trial * (App. 4a). This Court pointedly rejected the waiver theory in *Barker*. Because the Court of Appeals required a showing of compelling countervailing considerations to overcome the "waiver," its decision directly conflicts with the dictates of this Court's subsequent decision.

Third, the lower court's only consideration regarding the reason for delay was as follows:

> "Although the government's *unexplained* 28-month delay in preparing for trial might in some circumstances be unreasonable, there is no suggestion here that the delay was *deliberately oppressive.*" App., p. 4a (footnote omitted) (emphasis added).

Contrary to this Court's opinion in *Barker,* the Court of Appeals clearly opined that only "deliberate" or

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* The court's opinion pointed out that the Second Circuit has now adopted new Rules governing pretrial delays and that defendant is not required to assert his right. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971). Even though this petitioner was tried subsequent to adoption of those provisions, he was condemned by the waiver theory because most of his five-year delay occurred prior to the rule's enactment.

"intentional" governmental delay could be deemed oppressive or unreasonable. This Court specifically pointed out that deliberate delay in bringing a defendant to trial would weigh heavily against the government. But even unintentional delay, if unreasonable, can result in the denial of an accused's right. The Court of Appeals clearly erred in this regard.

Fourth, the Court of Appeals characterized the death of petitioner's close associate as the loss of purely "negative" testimony, which would not have "exonerated" petitioner:

> "At best what the witness had failed to see, claimed to be inconsistent with the testimony of five government witnesses, might have affected their credibility. Such a minimal showing of possible prejudice will not suffice to overcome appellant's waiver of his right to a speedy trial." App. 4a.

The court flatly rejected petitioner's claim of prejudice due to the death of a most vital witness simply because that witness' testimony "would clearly not have exonerated [petitioner]." Admitting that the witness' testimony might have affected the credibility of the five government witnesses, the Court of Appeals labeled the death of this witness as a "minimal" showing of possible prejudice not sufficient to overcome petitioner's failure to assert his right to a speedy trial.

This insensitivity to the damning effect the government's delay had perpetrated on petitioner's defense cannot stand in light of this Court's decision in *Barker*. It is appropriate, therefore, that if this petition is not granted for plenary review by this Court, it should be granted for the purpose of vacating the decision below and remanding for reconsideration in light of *Barker*.

II

Petitioner Was Irreparably Prejudiced by Testimony Concerning a Co-Conspirator's Conviction of Perjury

Petitioner was denied a fair trial as a result of the government's deliberate introduction of testimony concerning an alleged co-conspirator's prior conviction for perjury for statements to a grand jury pertaining to the exact events in issue at the trial below. The Court of Appeals effectively approved of the government's reprehensible conduct by concluding that petitioner was foreclosed from raising the issue because his inexperienced trial attorney had failed to make the "proper objection." App. 5a.

The nature of the injury to petitioner is best shown by recountation of the situation at trial. Perhaps realizing the weakness of the evidence it could present to the jury against petitioner, the government sought to bolster its case by introducing to *this* jury the opinion of a *prior* jury regarding transactions between petitioner and Robert Elvin. Elvin had been indicted as a co-conspirator but had pleaded guilty and testified for the government. During direct examination of Elvin, the prosecutor asked:

> "Q. Now, other than your plea of guilty to the conspiracy count of this indictment, have you ever been convicted of a crime?
> "A. Yes, sir.
> * * *
> "Q. And you were convicted by a jury after trial?
> "A. Yes, sir.
> "Q. And what were you convicted of?
> "A. Perjury, sir, Perjury in front of the grand jury.
> * * *
> "Q. What was the perjury you were charged with?

MR. BERKOWITZ: I must object, if the Court pleases. That would be set forth in the information.

THE COURT: I will permit him to ask that.

"A. I was asked at the grand jury had I ever cashed or caused tickets to be cashed for Dave Handel. I denied this. For anybody else, I denied this. I denied almost everything having to do with twin double deals.

"Q. And that was the basis of the perjury charge on which you were convicted?

"A. Yes, sir.

"Q. And when you were before the grand jury and when you denied dealing in twin double tickets with Mr. Handel and others, did you lie?

"A. Yes, sir." (Tr. 101-3.)

This answer was not only incredibly prejudicial to petitioner—it was wrong. Elvin's perjury indictment specified four *separate* perjurious answers—only one of which concerned petitioner—and ony *one* of which would have sufficed for Elvin's conviction (Tr. 105). But when Elvin answered as he did, this jury was led to believe that *another* jury had already passed on the truthfulness of Elvin's denial of transactions with petitioner and had found beyond a reasonable doubt that Elvin did in fact cash tickets for petitioner. But this was not the case.

On cross-examination of Elvin, petitioner attempted to counter the prejudice as best he could by pointing out to this jury that four separate answers had been specified in the Elvin perjury indictment. Even this effort was to no avail. On redirect examination, the prosecutor again inquired:

"Q. Do you recall yesterday being asked by Mr. Berkowitz about the specification of perjury on the indictment that you were charged with?

"A. Yes, sir.

"Q. Was one of the specifications in the indictment involving the question of whether you ever received a winning twin double ticket from Mr. Handel?

"A. Yes, sir.

"MR. BERKOWITZ: Objected to, we have been over this.

"THE COURT: I will permit it. Overruled.

"Q. You appealed that conviction?

"A. Yes, sir, I did.

"Q. In the Court of Appeals?

"A. Yes, sir.

"Q. And the conviction was affirmed?

"A. Yes, sir.

"Q. And you petitioned for certiorari to the Supreme Court and that was denied?

"A. Yes, sir." (Tr. 185-86.)

The knife had been inserted and turned the second time.

This testimony was the most severely prejudicial hearsay possible. It not only carried the imprimatur of a criminal verdict, it contained virtually no probative value. The government succeeded in introducing over objection the judgment of a prior jury to prove the truth of the matter asserted therein.

In essence, the government asked Elvin whether another jury, on the same facts before this jury, had found this petitioner guilty. Specifically, the government sought to convince this jury that Elvin had cashed tickets for petitioner by introducing the previous jury's verdict as evidence that the jury had disbelieved Elvin's earlier denials. Obviously, petitioner was not a party to that action and could not be bound by its outcome—even if such outcome were as the gov-

ernment portrayed it. There simply can be no justification for admission of this hearsay testimony.

Perhaps even more important than the fact that the testimony was hearsay is the fact that it was probative of absolutely nothing. Potentially prejudicial evidence may of course be admitted if its probative value clearly outweighs countervailing considerations, but the trial court clearly abused its discretion when it admitted highly prejudicial evidence which possessed absolutely no probative value. In this instance, it was impossible to determine from the single-count indictment, with four perjury specifications, whether the jury's general verdict was the product of its disbelief of Elvin's testimony regarding petitioner or its disbelief of his testimony on any one or all of the other three specifications. The prosecutor was fully aware of that fact. Yet he deliberately pursued this inflammatory line of questioning which could only result in irreparable prejudice to petitioner.

Of course the government was entitled to anticipate an attack on Elvin's credibility by proving his prior conviction—with this we have no quarrel. The government, however, went much further—its effort was not to defuse an attack on Elvin's credibility but outrageously to prejudice petitioner.

In light of the fact that Robert Elvin was the government's key witness in its case, this prejudicial hearsay testimony, used to buttress his own statements, was plain error. Under the government's theory of the case, Elvin played the central role in the conspiratorial scheme. He was the middle-man who allegedly received winning tickets from petitioner and parceled them out among individuals willing to serve as cashers.

It was only Elvin's testimony regarding his alleged conversations with petitioner which gave any basis to the charged conspiracy. And it was Elvin to whom subsequent witnesses pointed as having told them that the winning ticket to be cashed came from petitioner. Consequently, verification of Elvin's testimony was vital to the proof of the prosecution's case—and so admission of the prior jury's verdict to provide that verification was harmful error requiring reversal.

Furthermore, no effort was made by the government or trial court to reduce the harmful impact of the obviously prejudicial testimony. There was no curative instructions given and what effort was made by petitioner to offset the prejudice was immediately and intentionally undone by the government.

Despite the obviously prejudicial effect of telling one jury that another jury had found beyond a reasonable doubt that Robert Elvin had cashed tickets for petitioner, the Court of Appeals concluded that:

> "... review is foreclosed by appellant's failure to make any proper objection below." App. 5a.

Rule 52(b), as well as decisions of this Court, see *e.g.*, *United States* v. *Atkinson*, 297 U.S. 157 (1936), provide that instances of plain error at trial may be reviewed without the necessity of a timely objection.

Here, there in fact was an objection, only it was the wrong one. Petitioner's attorney had not tried a case in many years and at several points requested the trial court's indulgence. When this testimony of Elvin's prior perjury conviction was elicited, he knew by instinct that it was inadmissible. But when he objected, the trial judge asked him to specify the grounds.

Groping, he relied upon the "best evidence" rule. The trial judge replied that if *that* was the objection he would permit the testimony.

The Court of Appeals has looked to this unfortunate scenario to justify not reaching the merits of petitioner's claim that the testimony was unreasonably and intentionally prejudicial, depriving petitioner of a fair trial. The court also pointed to the fact that petitioner subsequently, on cross-examination, brought out the circumstances of the four-count indictment and attempted to use the perjury conviction for impeachment purposes. This makeweight for ignoring the merits of petitioner's claim also ignores the fact that on redirect the prosecutor intentionally refocused the jury's attention on the alleged Elvin-petitioner transaction and emphasized that Elvin even had sought review of the conviction by the Supreme Court.

The testimony as well as the prosecutor's tactics were manifestly unjust and deprived petitioner of a fair trial in accordance with due process of law.

CONCLUSION

For the foregoing reasons petitioner prays that this Court grant the petition for writ of certiorari and either set the case down for argument or, in the alternative, summarily vacate the judgment below and remand for reconsideration in light of this Court's decision in *Barker* v. *Wingo*.

Respectfully submitted,

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